

DEPARTMENT OF INDUSTRIAL RELATIONS

**OCCUPATIONAL SAFETY  
AND HEALTH APPEALS BOARD**

2520 Venture Oaks Way, Suite 300

Sacramento, CA 95833

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**NOTICE OF PUBLIC HEARINGS OF THE  
OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD  
AND NOTICE OF PROPOSED CHANGES TO TITLE 8  
OF THE CALIFORNIA CODE OF REGULATIONS**

Pursuant to Government Code Section 11346.4 and Labor Code Sections 148.7, the Occupational Safety and Health Appeals Board of the State of California has set the time and place for Public Hearings on proposed changes to Title, 8, California Code of Regulations, Chapter 3.3, Articles 1, 1.5, 2, 3, 4, and 5 Sections 347, 350.1, 355, 359, 371.2, 374, 385, 386, 392.4, and 392.5:

**PUBLIC HEARINGS:**     **On November 15, 2006, at 11:00 a.m.**  
Occupational Safety and Health Appeals Board  
100 N. Barranca, Suite 410  
West Covina, California.

**On December 6, 2006, at 1:00 p.m.**  
Occupational Safety and Health Appeals Board  
2520 Venture Oaks Way, Suite 300  
Sacramento, California

**On December 18, 2006, at 11:00 a.m.**  
Occupational Safety and Health Appeals Board  
2520 Venture Oaks Way, Suite 300  
Sacramento, California

**DISABILITY ACCOMMODATION NOTICE:** Disability accommodation is available upon request. Any person with a disability requiring an accommodation, auxiliary aid or service, or a modification of policies or procedures to ensure effective communication and access to the public hearings of the Occupational Safety and Health Appeals Board should contact the Disability Accommodation Coordinator at (916) 274-5751 or the state-wide Disability Accommodation Coordinator at 1-866-326-1616 (toll free). The state-wide Coordinator can also be reached through the California Relay Service, by dialing 711 or 1-800-735-2929 (TTY) or 1-800-855-3000 (TTY-Spanish).

Accommodations can include modifications of policies or procedures or provision of auxiliary aids or services. Accommodations include, but are not limited to, an Assistive Listening System (ALS), a Computer-Aided Transcription System or Communication Access Realtime Translation (CART), a sign-language interpreter, documents in Braille, large print or on computer disk, and audio cassette recording. Accommodation requests should be made as soon as possible. Requests for an ALS or CART should be made no later than five (5) days before the hearing.

**OCCUPATIONAL SAFETY AND HEALTH  
APPEALS BOARD**

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CANDICE TRAEGER, Chair

NOTICE OF PROPOSED CHANGES TO TITLE 8  
OF THE CALIFORNIA CODE OF REGULATIONS  
BY THE OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

Notice is hereby given pursuant to Government Code Section 11346.4 that the Occupational Safety and Health Appeals Board, pursuant to the authority granted by Labor Code Section 148.7, and to implement Labor Code Sections 148.7, 148.8, 6301, 6600, 6601, 6603, 6604, 6605, 6610, 6618 and 6620, will consider the following proposed revisions to Title 8, Rules of Practice and Procedure, of the California Code of Regulations, as indicated below, at its Public Hearings on November 15, December 6, and December 18, 2006.

TITLE 8:      RULES OF PRACTICE AND PROCEDURE

Chapter 3.3, Subchapter 4, Articles 1, 1.5, 2, 3, 4, and 5  
Sections 347, 350.1, 355, 359, 371.2, 374, 385, 386, 392.4, and 392.5.

INFORMATIVE DIGEST OF PROPOSED ACTION/POLICY STATEMENT OVERVIEW

The Occupational Safety and Health Appeals Board (Board) is charged with hearing and resolving appeals filed by employers from occupational safety and health citations issued by the Division of Occupational Safety and Health. California Labor Code Section 148.7 authorizes the Board to adopt rules of practice and procedure for the matters that fall within its jurisdiction. The Board has adopted regulations to govern the appeals process and the procedure for reconsidering decisions made on such appeals (Title 8, California Code of Regulations, Sections 345-397).

This rulemaking proposal would expand and clarify various existing provisions pertaining to appeals. It would also add a regulation to address motions filed during the Board's reconsideration process. These proposed modifications will have the effect of clarifying the requirements for the parties to appeals before the Board, and will allow the Board flexibility to adapt to evolving technology.

This proposed rulemaking action contains non-substantive editorial changes, reformatting of subsections, and grammatical revisions. While these non-substantive revisions are not all discussed in this Informative Digest, they are clearly indicated in the regulatory text in underline and strikeout format, a copy of which is attached to this Notice. In addition to these non-substantive revisions, the following measures are proposed:

### Section 347

This section contains definitions for terms used in the Board's regulations. The Board proposes to add two new definitions in subsections (e) and (f) for "completed appeal form" and "day," respectively. The effect of adding these definitions will be to clarify terms used elsewhere in the regulations.

### Section 350.1

This section describes the authority of the Board's administrative law judges (ALJs), who are charged with hearing and resolving employer appeals from occupational safety and health citations. Subsection (a) lists a number of functions that the ALJs may perform. Amendments are proposed to explicitly state that ALJs may hold settlement conferences, compel discovery at any time in the proceedings, and take other actions during a proceeding that are deemed appropriate to fulfill the purposes of the California Occupational Safety and Health Act. These amendments will further clarify existing language in this section that affords the ALJs "the full power, jurisdiction and authority to hold a hearing and ascertain facts for the information of the Appeals Board" and "to regulate the course of a hearing."

### Section 355

This section addresses proper methods of serving documents during an appeals proceeding. Subsection (a) discusses the Board's maintenance of an official address for the parties to the proceeding. An amendment is proposed to state that an employer's failure to keep the Board apprised of its current contact information throughout the proceedings may result in dismissal of the appeal. This proposed change will clarify the importance of keeping this information current and will afford the Board a means to dispose of an appeal if it is no longer able to contact the employer.

### Section 359

Subsection (a) of this section specifies when an appeal is deemed filed with the Board. A proposed amendment would clarify that an appeal cannot be initiated by contacting the Division of Occupational Safety and Health. This amendment will clarify that communication with the Division does not effectuate an appeal.

### Section 359.1

This section addresses the appeal form used by the Board. Subsection (a) specifies the need to file the form with the Board. Proposed amendments would clarify when the form must be filed and explain that failure to file the form in a timely fashion constitutes grounds for dismissal. These amendments will add clarity and will notify employers of the consequence inherent in failing to complete their appeal.

### Section 371.2

Section 371.2 pertains to amendments made to citations or appeals prior to the hearing. Proposed amendments to subsection (a) would clarify when parties are deemed notified that an appeal has been docketed. These proposed changes will clarify the time period during which amendments may be made.

### Section 374

Section 374 addresses prehearing conferences. Subsection (b) discusses expectations for the parties participating in a prehearing conference. A proposed change would clarify that prehearing participants must be prepared to address the status of discovery compelled by the ALJ prior to the prehearing during the prehearing conference. This amendment will clarify existing regulatory language (section 350.1(a)) that affords the ALJs “the full power, jurisdiction and authority to hold a hearing and ascertain facts for the information of the Appeals Board” and “to regulate the course of a hearing.” It will also clarify expectations for the parties so that they can properly prepare for the prehearing conference.

### Section 385

This section pertains to decisions issued by the ALJs. Subsection (a) states that all proceedings shall be submitted at the close of the hearing unless otherwise ordered. An editorial amendment would clarify that “submitted” means “submitted for decision.” This amendment will clarify the term “submitted.”

### Section 386

Section 386 addresses post-submission amendments to the issues on appeal and to the Division’s action. Subsection (a) currently states that the Board may make these amendments after a proceeding is submitted for decision. A proposed change would state that the Board may amend these issues after both parties have presented evidence. This amendment will afford the Board the flexibility to make amendments before the matter is submitted for decision.

### Section 392.4

A new section 392.4 is proposed to address motion practice during the Board’s reconsideration process. The Board receives motions from parties after a petition for reconsideration has been filed. Subsections (a) and (b) of the new regulation would instruct parties on the requirements for filing motions as well as for submitting responses or opposition to a motion, and subsection (c) would specify the timeframes for the same. Subsection (d) would grant the Board discretion to permit late filings upon a demonstration of good cause. This regulation will provide clear guidance regarding the requirements and timeframes for motions submitted during the reconsideration process.

### Section 392.5

This section states that the Board will provide copies of tapes made of the appeal hearings upon request. Technical amendments are proposed for the title and subsections (a) and (b) to clarify that the Board

may provide a copy of the hearing in a recording medium other than a cassette tape (e.g., a CD). An amendment to subsection (c) would state that the requesting party is responsible for the cost of “delivery” as opposed to the cost of “postage.” The regulation currently refers to “postage.” These amendments will afford the Board the flexibility to use and rely on different forms of recording technology and will allow the Board to recoup the costs it incurs when a party requests that the Board deliver documents in a manner other than by standard mail.

#### DOCUMENTS INCORPORATED BY REFERENCE

None.

#### COST ESTIMATES OF PROPOSED ACTION

##### Costs or Savings to State Agencies

No costs or savings to state agencies will result as a consequence of the proposed action.

##### Impact on Housing Costs

The Board has made an initial determination that this proposal will not significantly affect housing costs.

##### Impact on Businesses

The Board has made a determination that this proposal will not result in a significant, statewide adverse economic impact directly affecting businesses, including the ability of California businesses to compete with businesses in other states.

##### Cost Impact on Private Persons or Businesses

The Board is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

##### Costs or Savings in Federal Funding to the State

The proposal will not result in costs or savings in federal funding to the state.

##### Costs or Savings to Local Agencies or School Districts Required to be Reimbursed

No costs to local agencies or school districts are required to be reimbursed. See explanation under “Determination of Mandate.”

#### Other Nondiscretionary Costs or Savings Imposed on Local Agencies

This proposal does not impose nondiscretionary costs or savings on local agencies.

#### DETERMINATION OF MANDATE

The Occupational Safety and Health Appeals Board has determined that the proposed regulations do not impose a local mandate. Therefore, reimbursement by the state is not required pursuant to Part 7 (commencing with Section 17500) of Division 4 of the Government Code because these regulations do not constitute a “new program or higher level of service of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution.”

The California Supreme Court has established that a “program” within the meaning of Section 6 of Article XIII B of the California Constitution is one which carries out the governmental function of providing services to the public, or which, to implement a state policy, imposes unique requirements on local governments and does not apply generally to all residents and entities in the state. (County of Los Angeles v. State of California (1987) 43 Cal.3d 46.)

These proposed regulations do not require local agencies to carry out the governmental function of providing services to the public. Rather, the regulations require local agencies to take certain steps to ensure the safety and health of their own employees only. Moreover, these proposed regulations do not in any way require local agencies to administer the California Occupational Safety and Health program. (See City of Anaheim v. State of California (1987) 189 Cal.App.3d 1478.)

The proposed regulations do not impose unique requirements on local governments. All employers - state, local and private - will be required to comply with the proposed standards.

#### EFFECT ON SMALL BUSINESSES

The Board has determined that the proposed amendment(s) may affect small businesses. However, no economic impact is anticipated.

#### ASSESSMENT

The adoption of this proposal will neither create nor eliminate jobs in the State of California nor result in the elimination of existing businesses or create or expand businesses in the State of California.

### ALTERNATIVES THAT WOULD AFFECT PRIVATE PERSONS

The Board must determine that no reasonable alternative it considered or that has otherwise been identified and brought to its attention that would be more effective in carrying out the purpose for which the action is proposed or would be as effective and less burdensome to affected private persons than the proposed action.

### DOCUMENT AVAILABILITY

A copy of the proposed changes in STRIKEOUT/UNDERLINE format is available upon request made to the Occupational Safety and Health Appeals Board's Office, 2520 Venture Oaks Way, Suite 300, Sacramento, CA 95833, (916) 274-5751. Copies will also be available at the Public Hearing.

An INITIAL STATEMENT OF REASONS containing a statement of the purpose and factual basis for the proposed actions and a description of any identified alternatives considered has been prepared and is available upon request from the Appeals Board's Sacramento Office.

The Occupational Safety and Health Appeals Board's rulemaking file on the proposed actions, including all the information upon which the proposals are based are open to public inspection Monday through Friday, from 8:30 a.m. to 4:30 p.m. at the Appeals Board's Sacramento Office.

The full text of proposed changes, including any changes or modifications that may be made as a result of the public hearing, shall be available from the Chief Counsel 15 days prior to the date on which the Appeals Board adopts the proposed changes.

Once the Final Statement of Reasons is prepared, it may be obtained by calling the telephone number listed above.

You can also access the Board's notice and the other materials associated with this proposal on the Appeals Board's website, the address for which is <http://www.dir.ca.gov/oshab>.

### PUBLIC COMMENT

Notice is also given that any interested person may comment on this proposal in writing, or orally at the public hearing. It is requested, but not required, that written comments be submitted so that they are received no later than December 1, 2006.

The official record of the rulemaking proceedings will be closed at the conclusion of the public hearing and written comments received after 5:00 p.m. on December 18, 2006, will not be considered by the Board unless the Board announces an extension of time in which to submit written comments. Written comments should be mailed to the address provided above or submitted by fax to (916) 274-5785 or e-mailed to [oshab@dir.ca.gov](mailto:oshab@dir.ca.gov). The Occupational Safety and Health Appeals Board may thereafter adopt the above proposal substantially as set forth without further notice.

CONTACT PERSON

Inquiries concerning either the proposed administrative action or the substance of the proposed changes may be directed to Jeff Mojcher, Chief Counsel, or Heidi Smith, Counsel, at (916) 274-5751.

OCCUPATIONAL SAFETY AND HEALTH  
APPEALS BOARD

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CANDICE TRAEGER, Chair